December 2019

Decision in CPLR Article 78 proceedings - Gonzalez, Elizabeth (2015-04-20)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 401130/2014
GONZALEZ, ELIZABETH
VS
NYS DEPARTMENT OF CORRECTIONS
Sequence Number : 001
ARTICLE 78

PART IA PART 16

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ Article 78 proceeding is granted to the extent provided in the accompanying memorandum decision dated April 20, 2015, along with the January 8, 2015 Interim Decision.

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Dated: April 20, 2015

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of
ELIZABETH GONZALEZ,

Petitioner,

Index No.401130/14
Motion Seq. No. 001

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TINA M. STANFORD, CHAIRWOMAN OF THE NEW YORK STATE BOARD OF PAROLE,

Respondents,

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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SCHLESINGER, J.:

Elizabeth Gonzalez was seventeen years old when she committed a series of robberies, robberies where the victims were older women who would be coming out of banks. Tragically, after Ms. Gonzalez grabbed the pocketbook of one such woman, that person fell, broke her neck and died. Another victim also fell and was injured.

Ms. Gonzalez had a senior partner in these crimes. He was thirty-three years old and a heroin addict, as she was. On April 30, 1997, after a few days spent on jury selection and openings to the jury, a plea bargain was reached wherein Ms. Gonzalez entered a plea of guilty to felony murder and robbery. The sentence agreed upon and approved by the judge, the Honorable Rena Uviller, was eighteen years to life.

Time goes by for all of us. And we use it or waste it in a variety of venues with different consequences. For Elizabeth Gonzalez, it was time spent in prison, and it appears that after approximately 10 years, a remarkable transformation in her took

place. Perhaps the best way to describe this change is in her own words written to Judge Uviller in a two page letter, dated October 21, 2013. In part she wrote:

> The first years of my incarceration I did not live on a positive path, I got into fights, unnecessary institutional misbehavior reports. However, in 2007 I decided that I had to make some changes and become a better individual. I went to school and obtained my G.E.D. Then I enrolled in college where I obtained an Associate in Arts Degree, and I'm currently taking classes for my Bachelors. In dealing with my health issues, I decided to turn it into a positive and became a peer educator and a certified counselor for HIV/AIDS.[1] I enjoy helping others so much. I also became a teacher's aide for pre-GED students, a facilitator for an aggression program called A.R.T., and I am currently working as a grievance representative. The term is 6 months in which my peers at the prison elect me, and I have been a representative for 7 terms. I used to be a follower, but today I represent 850 women at Bedford Hills.

The letter also talks about a mentally challenged sister who needed a place to live and how that need led Ms. Gonzalez to meet Sister Elaine Roulet, the founder of Providence House and former Director of the Children's Center at Bedford Hills. She talks about the relationship that developed between her and Sister Roulet, which led her to insights into her actions. For example, she realized that attempting to steal money in the way she did was "the worst decision I've made in my life, I did deserve to go to prison for the 18 years I was given."

Toward the end of this quite remarkable letter, Ms. Gonzalez tells the judge she will be coming up for parole in December 2013, and she asks "humbly" if Justice Uviller

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[1] Earlier in the letter, Ms. Gonzalez related that she had been raped by her stepfather and had contracted HIV.

could write a letter to the Board on her behalf. She says:

> I've never forgotten the last words you said to me when you sentenced me. You said, "I hope someone teaches you respect for human life." Your Honor, I've learned that respect. I'm 36 years old and I know I committed a horrific act and made a huge mistake but I'm asking for a second chance at life. I want a chance to live a productive life, take care of my sister and give back to society all I've learned during my incarceration. My plans are to become an HIV/AIDS counselor for the youth.

The judge did respond. She wrote a letter dated November 15, 2013, to Ms. Nancy Pena of the Guidance Unit at Bedford Hills. While Judge Uviller "fully appreciate[d] that parole decisions are within the sound discretion of the Parole Board," she went on to say:

> If, however, the accomplishments and self awareness Ms. Gonzalez describes have been verified, I believe that parole would be fully consistent with the twin goals of community safety and prisoner rehabilitation.[2]

Ms. Gonzalez appeared before the Parole Board on December 3, 2013. This was noted to be an "Initial Release Appearance," although she had made an earlier appearance in July 2013 before a different Board [a Limited Time Credit Allowance (LCTI)] as a result of earning six months good time. The minutes of the hearing were transcribed. From what one can tell by reading the five and a half pages of minutes, the hearing was very short. Two Commissioners were present, but one, Commissioner

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[2]One accomplishment not mentioned here but described by Ms. Gonzalez in her letter to Judge Uviller and perhaps worth mentioning was her work in the Prisons' "Puppy Behind Bars Program." There, she raised two service dogs who were then given to Veterans who suffered with Post Traumatic Stress Disorder and Traumatic Brain Injury.

Sally Thompson, did virtually all the questioning. She also delivered the decision reached, "Parole denied. Hold 24 months" (the maximum), very soon after the interview with Ms. Gonzalez had ended.

Clearly, the major part of the hearing was devoted to the crimes petitioner had committed eighteen years earlier. Not only were the crimes repeatedly mentioned, but there was a constant reference to the age and vulnerability of the victims. For example, at the beginning, Ms. Gonzalez is asked: "Were all the victims elderly?" (p 2, line 19). The Commissioner then adds: "I see one was approximately 75, which you forcibly removed her handbag knocking the victim down... You also knocked down and stole the bag of an 86 year old approximately ... Were these all females also?" (p 2, lines 21-25).

On the following page, Ms. Gonzalez was asked if she knew the precise age of the victims. Then the Commissioner states: "You were young and strong. Was it really necessary to knock these senior citizens down like that?" (p 3, lines 19-20). There was a further pursuit of this subject matter (on p 4, lines 5-6): "Senior citizens. Why target senior citizens? They are so vulnerable." On line 11, a comment is added: "Horrible crime".

On that same page and on the next, inquiry is made about Ms. Gonzalez's "rehab efforts" and family support, as well as job opportunities and a place to live. Ms. Gonzalez's answers here are consistent with the information she provided to Judge Uviller. She would live at Providence House and she would be enrolled in a special program at St. Luke's Hospital called, appropriately, the Coming Home Program.

The Commissioner then refers to letters of support, "a couple of letters from Robert Dennision", the prior New York State Parole Board Chairman (p 6, line 2). But no reference is made of the many other letters that Ms. Gonzalez submitted, including

the one from her sentencing judge. Finally, also on page 6, she is told that the Commissioners have received her COMPAS Risk Assessment, which evaluated her risk of felony violence as "low". However, she is also told that this assessment states that "History of Violence is high" and, without any known predicate for this assessment, that "Reentry to substance abuse is highly probable." Referring to those assessments, the Commissioner said: "So there's some issues you have to work on" (lines 20-23).

It is very difficult to understand the meaning of this statement unless the Board was noting that Ms. Gonzalez had been addicted to heroin eighteen years earlier, when she entered prison. Perhaps the thought was that prior addiction could be a continuing challenge. But again, it is a curious comment as it suggests that there was a continuing problem in that area — which of course there was not. Nothing in Ms. Gonzalez's prison record makes any reference to prison use of any illegal drug.

The hearing ends when Ms. Gonzalez is asked if she wants to add anything "that we have not covered" (p 7, lines 1-2). She responds that eight years earlier she did a "big turnaround" and pleads for an "opportunity to reenter society. I'm not the same person any more" (p 7, lines 6-8).

The denial of parole is the predicate for the Article 78 petition now before this Court. In the Petition counsel for Ms. Gonzalez discuss what they believe were significant problems with the hearing and decision. Therefore, at this point, the decision shall be reviewed as it is the vehicle by which the Commissioners explain their rationale for continued incarceration. A copy of the Parole Board's hearing and decision, dated December 3, 2013, is attached to the Petition as Exhibit 2.

The decision begins by stating that Ms. Gonzalez' request for parole was denied. She is told the following reasons (p 8, lines 8-14):

> After a careful review of your record and this interview, it is the determination of this panel that if released at this time, there is a reasonable probability that you would not live and remain at liberty without violating the law, and your release at this time is incompatible with the welfare and safety of the community.

Clearly the above statement is general, and the Board is appropriately required to give further explanation. Therefore, what followed is an attempt to do that, pointing out the factors upon which the denial was based. The first item mentioned referred to the serious nature of the crime, adding that "These were vulnerable, innocent, elderly victims" (p 8, lines 19-20).

Passing reference is then made to "numerous disciplinary infractions." Then the decision notes other factors that were also considered, such as Ms. Gonzalez's "positive programming", "improved disciplinary record" and "rehabilitative efforts" (lines 24-25). Mentioned in this listing of considerations by the Board is "risk to the community," but nothing further is said with regard to this factor.

The decision then ends with this statement (at p 9):

> However, discretionary release is not appropriate at this time. For the panel to release would so deprecate the severity of the crimes as to undermine respect for the law, as you placed your own interests above those of society's senior citizens.

Discussion

Counsel for petitioner urges that in so many ways the decision by the Board was deficient, arbitrary and capricious, and failed to observe the applicable law, and that these failures all contributed to what appeared to be a predetermined denial.

Therefore, Ms. Gonzalez's rights were violated, leading to extended incarceration. Extended incarceration is a fancy way of saying loss of freedom — here for an additional two years.

I agree with all of these contentions. Let me now, unlike the Board, explain in detail why I have come to this conclusion.

In 2011, significant amendments were passed to the Executive Law. Specifically, §259-I was repealed and the factors that the Parole Board was statutorily required to apply were set forth in §259-I, subd. 2(c)(A). Those factors are:

(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;

(ii) performance, if any, as a participant in a temporary release program;

(iii) release plans including community resources, employment, education and training and support services available to the inmate;

(iv) any deportation order issued ...;

(vi) any statement made to the board by the crime victim ...;

(vi) the length of the determinative sentence to which the inmate would be subject ... ;

(vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors and activities following arrest prior to confinement; and

(viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

But in addition to a directive that the Board make a serious consideration of all the applicable factors, §259-c(4) of the Executive Law was amended to remove the reference to the "establishment of written guidelines for its use in ... the fixing of the

minimum period of imprisonment." The Parole Boards was no longer given that role, pursuant to an earlier court decree that the role of determining the length of a prison term was to be assumed exclusively by the sentencing court. Instead, risk assessment procedures were to be substituted and used by the Parole Board.

Specifically §259-c(4) directed the State Board of Parole to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

The above changes and additions were designed to provide a procedure, a written procedure, that would require the Commissioners to evaluate "rehabilitation" and "the likelihood of success ... upon release." This approach was intended to represent a major "shift in focus [with] the potential to reduce the number of fully rehabilitated individuals who are denied parole release solely on the seriousness of their crimes, the one factor that these individuals have no power to change." Philip M. Genty, *Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, NYLJ, September 1, 2011, p 4.

Unfortunately, the Board did not establish such written procedures, but in an attempt to move toward that requirement it began in early 2012 to use COMPAS (Correctional Offender Management Profiling for Alternative Sanctions). COMPAS is a risk and needs assessment instrument developed by Northpointe Institute for Public Management. It offers actuarially based estimates, expressed in scores of one for the lowest through ten for the highest, of an offender's risk of (1) felony violence, (2) re-

arrest, and (3) absconding from supervision. It also assesses an inmate's risk of encountering circumstances conducive to criminality, such as substance abuse, unemployment, and low family support, all conditions which might interfere with successful re-entry into society (See Practitioner's Field Guide to COMPAS, www.northpointeinc.com).

Significantly, a COMPAS report was prepared and submitted to the Board in connection with Ms. Gonzalez's appearance. Also, it was referred to, at least in part, in the Board's denial of parole. However, the manner in which it was used indicated an inability or an unwillingness to understand and/or use it appropriately.

First of all, the positive aspects of the report, wherein Ms. Gonzalez was given low scores in the first enumerated and clearly most important risk factors, were virtually ignored. Her "Risk of Felony Violence" was rated "Low" with a score of "2" out of "10". Her "Arrest Risk" was rated "Low" with a score of "1" out of "10". The "Abscond Risk" was also "Low" with a score of "1".

The only scores that the Board cited to were the sole negative scores relating to "History of Violence," rated "High" with a score of "8", and Re-Entry Substance Abuse, also an "8" with a "Highly Probable" comment. But as noted in *Cappiello v New York State Board of Parole*, 6 Misc3d 1010A (Sup. Ct., NY Co. 2004), in a decision by Judge William Wetzel cited favorably by the Appellate Division, First Department, in *Wallman v Travis*, 18 AD3d 304, 307 (2005), family members who suffer from the murder of a loved one suffer "no greater agony." "It is pain which does not abate over the years and nothing can be done to relieve that suffering. The only variable that can change in this situation is the defendant." *Cappiello* at p 6. So the crime, as horrible as it often is, is fixed.

On page 6, lines 20-23, of the decision Commissioner Thompson said:

> We also have your COMPAS Risk Assessment. Overall risk of felony violence is low. History of violence is high. Reentry to substance abuse is highly probable. So there's some issues you have to work on.

This was the final comment by the Board before asking petitioner if there was anything she wanted to add.

The rating for "history of violence" had to be a high score because the crime Ms. Gonzalez had committed was a violent one, something to which the Board repeatedly referred. Thus, there was nothing to work on in that regard, except for the many programs Ms. Gonzalez was involved in to help her to understand her past violent behavior and replace it with a clear aversion to such future behavior.

As to the substance abuse, once again that was referring to her heroin addiction which had led to the violence. But Ms. Gonzalez had worked on this problem, and no factual predicate existed for the finding that future substance abuse was the "highly probable." Specifically, she had enrolled and completed a year long Integrated Dual Disorder Treatment Program or IDDT geared to help her with both her substance abuse and her underlying PTSD from her many early childhood deprivations. Then, after the completion of IDDT, she had enrolled in and continued to actively participate in a Narcotics Anonymous program.

The Board seemed to know nothing about these efforts. It should have, particularly in light of the statement it made about problems Ms. Gonzalez had to work on. In fact, it ignored the fact that she had been working on the problem, indicating that she still had issues to work on. Again, these issues were exclusively related to the

person she had been 18 years earlier. The Board conflated that fact, suggesting they were ongoing issues, despite the fact that Ms. Gonzalez's institutional record showed that she had recognized and indeed worked on those precise issues.

How else did the Board fail? As noted above, the Board was mandated by Executive Law §259 to consider — truly consider — various factors in addition to the nature and seriousness of the crime. In the past that factor was to be given extraordinary and almost exclusive consideration. But that approach was changed and a forward-looking review was adopted with an emphasis on how the inmate had rehabilitated herself so as to succeed upon release.

Here, I find that the Board paid mere lip service to those other factors. While Ms. Gonzalez was asked about what programs she had completed, there was no pursuit of this subject. Most significantly, though, the Board apparently lacked important documents and took no action to obtain them. The Board noted "some letters of support from Robert Dennison." But it said nothing of other significant letters, such as the one from Sister Elaine Roulet, a very personal supportive letter written by a professional and religious person who had known Ms. Gonzalez since she had entered the prison. She said "I have absolutely no reservation for her release from Bedford Hills Correctional Facility" and "as the former Chaplain and founder of The Children's Center and Providence House it is my opinion that inmate Gonzalez has ben a model prisoner and I feel very certain that Elizabeth will be a model citizen." This letter was completely ignored.

Similarly and perhaps more significantly, the Board did not have a copy of a letter written by Donna Hylton from St. Luke's Hospital, assuring the Board that

petitioner would be "provided with full comprehensive care." In fact, Ms. Gonzalez mentioned this letter, which the Board did not have, and she explained the situation as best as she could. She indicated that she had given the letter to her counselor. The Board, illustrating a seeming lack of interest in this important document, one which assures that the inmate will have significant care and services upon her release, responded that "it's on the record, and we'll take your word for it" (p 6, line 14).

But most important was the apparent failure of the Board to refer to the letter from the sentencing judge, Hon. Rena Uviller, dated September 15, 2013, which the Board may have never even seen. This letter, earlier referred to, said that if there had been verification of Ms. Gonzalez's accomplishments and self-awareness, "I believe that parole would be fully consistent with the twin goals of community safety and prisoner rehabilitation."[3]

The Board failed in yet another way in giving a conclusory decision without any real explanation. Such a decision is in clear violation of Executive Law §259-i(2)(a), which directs the Board to state its reasons for denial "in detail and not in conclusory terms." *See also, Malone v Evans*, 83 AD3d 719 (2nd Dep't 2011).

The denial, which seems to have been delivered almost immediately, first echoed the statute, providing "that there is a reasonable probability that you would not live and remain at liberty without violating the law, and your release at this time is

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[3]In an interim decision, I had directed respondent's counsel to provide opposing counsel and the Court with a list of the documents contained in petitioner's parole file. This was done, enabling the Court to know what documents were there, but not which documents were actually read and considered. Counsel for respondent made that distinction. Therefore, while Judge Uviller's letter was there included in Section III-B "Official Letters" under the heading "Support Letters," only those letters from Robert Dennison were listed.

incompatible with the welfare and safety of the community". Realizing this conclusion needed a lot more explanation in terms of reasons for its basis, the Board then stated that the decision was based on certain factors.

The first and second factor, really only one, detailed the violent crime committed by Ms. Gonzalez 18 years ago to "vulnerable, innocent, elderly victims." Further, those actions displayed a "propensity for violence". But that in no way explained how the deeds of a 17-year old drug addict were still controlling with respect to the person Ms. Gonzalez had now become.

She was also told that she had incurred "numerous disciplinary infractions" but what was omitted was that these had all occurred at least eight years earlier. Since then, Ms. Gonzalez had had a clean institutional record.

In passing, because the Board had to know that other factors were required to be considered, the Commissioner said that they were. It stated that "positive programming, improved disciplinary record, risk to the community,[4] rehabilitative efforts, needs for successful reentry, community support, parole packet and statutory factors are also considered". However, all the items in the parole packet, with the exception of the two unfavorable COMPAS scores already discussed, were in Ms. Gonzalez's favor. Yet no attempt was made to show how these other factors, such as the judge's letter, were considered and why they did not outweigh the crime. *See, Matter of Johnson v New York State Div. of Parole*, 65 AD3d 838 (4th Dep't 2009).

The last line in the decision was an echo of the statutory language, stating once again with a focus on the victim that Ms. Gonzalez's release "would so deprecate the

[4] As previously indicated, the risk assessment was low.

severity of the crime as to undermine respect for the law, as you placed your own interests above those of society's senior citizens." The use of this formulaic language has been repeatedly criticized. *See, e.g., Matter of King*, 190 AD2d 423 (1st Dep't 1993). Here there was no explanation as to why this result should occur in light of the crime's happening more than 18 years earlier, the significant maturity and turn around that Ms. Gonzalez had demonstrated, and the low score COMPAS had given her regarding the "risk of felony violence".

The final, and perhaps most egregious, error made by the Board in this short hearing and brief decision was their continuing improper reference to the "vulnerable victims." The purse snatches that resulted in a death and a serious injury were of course serious and terrible. Accordingly, Ms. Gonzalez, as a result, pled guilty to felony murder. She was sentenced to substantially fewer years than the maximum, presumably because of the lack of intentional murder, her young age, the influence of her far more senior partner in the crime and their heroin addiction, and other factors not known to this Court. But as the First Department said in *Matter of King*, 190 AD2d at 433:

> Certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself.

In *King*, the defendant, in the course of a robbery of a fast food restaurant, killed an off duty police officer. During the parole hearing, the Board dwelled almost

completely on the circumstances of King's crime. The only specific factor it appeared to consider in denying release was the fact that it was a police officer who had been the victim and who had died.

As in the subject proceeding, the Board in *King* used the statutory language in denying release to express its decision; i.e., that "petitioner's release would so deprecate the seriousness of the crime as to undermine respect for law by reason of the fact that the victim of the crime was a police officer." 190 AD2d at 433. In the decision here, the Board used nearly identical words with an equal emphasis on the status of the victim (albeit here a senior citizen rather than a police officer), stating that: "For the panel to release [you, petitioner] would so deprecate the severity of the crimes as to undermine respect for the law, as you placed your own interests above those of society's senior citizens."

Finally, in *King* the Board did just what it did here. It mentioned the other factors relevant to petitioner's release, all of which were favorable to him, but they were mentioned only to dismiss them in light of the fact that a police officer had been killed. The Appellate Division, which affirmed the Supreme Court's decision vacating the Board's decision, said in this regard (at p 434):

> For the Board to simply decide that any case which involves the death of a police officer, regardless of all the other circumstances surrounding the crime, automatically necessitates the denial of parole is a breach of the obligation legislatively imposed upon it to render a qualitative judgment based upon a review of all the relevant factors.

That is precisely what occurred in this case, with "vulnerable senior citizens" having been substituted for a police officer. The relevant statutory factors were not

considered here. In this rather perfunctory hearing and decision, everything but the felony murder was ignored. It should not have been. If rehabilitation seems to be the key, the key to release and the opportunity for a new life, it appears Ms. Gonzalez had earned that key. At least the Board should have seriously considered her transformation.

Therefore, I am annulling the decision of the Board of Parole and ordering a *de novo* hearing before different Commissioners. Finally, consistent with this opinion, I am directing that care be taken to ensure that all documents of support from whatever source be considered by the Board and that the Board state on the record what they specificall reviewed. That review must be a serious one, with no concentration on the status of the victims and a true analysis of petitioner's COMPAS. Further, the Commissioners should adhere to the rationale behind the amendment made to the Executive Law, which is to prevent the re-sentencing of an inmate by the Parol Board to a longer term than the one selected by the Judge and promote the evaluation of factors such as the inmate's achievements in prison, her risk assessments, outside and family support, and whether she has become a different person, one who has rehabilitated herself many years after a crime committed in her youth.

Finally, the new hearing should take place as soon as possible, but no later than sixty (60) days from the service of this decision with notice of entry. The Board set December 2015 as petitioner's next appearance. Through no one's fault, more than half of the two years has already elapsed.

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the December 3, 2013 decision by the Parole Board is annulled; and it is further

ORDERED that the matter is remanded for a new parole hearing before a new set of Commissioners consistent with the terms of this decision.

Dated: April 20, 2015

APR 20 2015

J.S.C.

ALICE SCHLESINGER